United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing BBP

75-1217

To be argued by
ETHAN LEVIN-EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1217

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM CRUZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

William Cruz appeals from a judgment entered on June 6, 1975, in the United States District Court for the Eastern District of New York (Judd, *J.*), convicting him, following a three day bench trial, of knowingly possessing with the intent to distribute, on February 17, 1974, approximately four ounces of cocaine hydrochloride, in violation of Title 21, United States Code, Section 841(a)(1) (count one). A second count in the indictment charged Cruz with distributing those four ounces of cocaine also in violation of Title 21, United States Code, Section 841(a)(1). Judge Judd, likewise, found appellant guilty of that crime. He acquitted, however, appellant's co-defendant, Domingo Quinones of both charges.[1] Appellant

[1] This was the second trial of this case. The first ended in a mistrial on February 28, 1975 when the jury announced that they were unable to reach a unanimous verdict as to either defendant.

was sentenced to a term of imprisonment of ten years on each count, the sentences to run concurrently. In addition, a five thousand dollar fine was imposed on Count One. Appellant is currently in state custody on various narcotics charges pending before the Kings County Supreme Court.

On this appeal appellant argues that: (1) insufficient evidence was adduced to sustain the conviction; (2) it was error for the Court to allow evidence of prior similar narcotic activities engaged in by him; and (3) appellant's conviction should be reversed because it was irreconcilable with the acquittal of his co-defendant.

Statement of Facts

On April 22, 1975, following the declaration of a mistrial (see footnote 1, *supra*, at 1) appellant and his co-defendant Domingo Quinones executed a written waiver of trial by jury and the retrial of this case was commenced before Honorable Orrin G. Judd, United States District Judge, Eastern District of New York (App. 7).[2]

A. The Government's Case

Detective William McGroarty, of the New York City Police Department testified that, on February 7, 1974, while acting in an undercover capacity, he traveled to 999 Bushwick Avenue in Brooklyn (T. 45-47). There, he met with the occupant, one Ronald Richards and an-

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[2] References in parentheses preceded by "App." refer to pages in appellant's appendix. Inasmuch as appellant's appendix is not paginated, the page reference is to what would have been the noted page. References preceded by "T." refer to pages in the transcript of the trial.

other person, one Gary Shifren (T. 47). On that occasion, McGroarty purchased approximately four ounces of cocaine from Richards (T. 51). Following that night he returned on at least one occasion to Richards' home to purchase cocaine, or spoke to him on the telephone to set up future transactions (T. 54-57).

A week and a half later, on February 19, 1974, as a result of one such telephone call, McGroarty and a colleague, Police Officer Elaine Poster, went to the Bushwick Avenue address at approximately 6:40 P.M. (T. 59). They met with Richards and were told that there would be a slight delay in the delivery of the eight ounces of cocaine they were there to purchase (T. 60). McGroarty testified that Richards told him "[t]hat he would have to go out and make arrangements for the delivery [sic]" (T. 60). After being so advised by Richards, McGroarty and Poster left the vicinity (which was being surveilled by other officers) and returned, as per Richards' instructions, at about 7:20 P.M. (T. 61). When they arrived the second time, Richards escorted them to a room on the second floor of the house and told them to wait. He said that he had made arrangements for the cocaine to be delivered at approximately 8:15 P.M., and that the price, to McGroarty, would be $8,000 (T. 61).

After some conversation about firearms, McGroarfy heard the doorbell ring. It was exactly 8:15 P.M. according to the witness' watch (T. 63-64). Richards said, "See, I told you, that must be them now", and left the room (T. 64). McGroarty then went to the door and heard Richards speaking to someone in English, although he couldn't hear what was said. Approximately four or five minutes later Richards returned to the room and placed two plastic bags containing white powder on the table. He strained the powder and placed it all in one bag. A price of $7,500 was then agreed upon and the

sale was consummated (T. 65-66). After Richards gave the cocaine to McGroarty he escorted them to the door and they left the house (T. 67).

Investigator Dwayne Mercer, of the New York Department of State Police, testified that on February 19, 1974 he was one of those persons surveilling 999 Bushwick Avenue. He observed Officers McGroarty and Poster enter the building at about 6:40 P.M. and leave shortly thereafter (T. 204-205). At approximately 6:55 P.M., he saw a male leave the house and enter a light colored vehicle. This person was observed driving away from the house and then returning at about 7:15 P.M., at which time he was identified as Ronald Richards (T. 207-209). At 7:20 P.M. Mercer observed the return of Officers McGroarty and Poster (T. 209). Investigator Mercer testified that, at about 7:35 P.M. he observed a blue 1973 Ford automobile pull up in front of the house. Two men left the car and entered 999 Bushwick Avenue (T. 210). The license plate on the blue Ford, 146-KDC, was checked, and it was determined that the car was owned by the appellant, William Cruz (T. 211). Mercer did not observe anyone else entering or leaving the house during his surveillance, other than McGroarty, Poster and the two men from the blue Ford. Subsequently, when the two men left the house and drove away in the blue Ford they were followed by other officers. William Cruz was identified as the driver of the car by Detective Frank Caban (T. 244-245).

The Government next called Ronald Richards as a witness. Richards testified that he lived at 999 Bushwick Avenue, Brooklyn, New York, and that during the period of October 1973 through April 1974 the primary source of his income was the illicit sale of narcotic drugs and other controlled substances (T. 272-273). Richards first met appellant's co-defendant, Quinones, in December, 1974

when his friend "Louis" introduced them (T. 274). He met with Quinones at 999 Bushwick Avenue during the first week of December 1973, at which time he purchased one ounce of cocaine for $1,400 (T. 274-276). They agreed to do more business in the future and met again approximately two weeks later (T. 276). At this second meeting Richards told Quinones that he was interested in buying two ounces, but of better quality. Quinones responded by saying that he would have to introduce Richards to his "compadre", which Richard took to mean Quinones' supplier (T. 277-278). Later that day Quinones returned to the house and sold Richards two ounces of cocaine for $2,500 (T. 279). At this transaction Richards indicated a desire to purchase one-eighth kilogram of cocaine from Quinones. In order to facilitate further communication in contemplation of this sale, Quinones left his business card with Richards (T. 280-281).

During the first week of January, 1974 Richards called Quinones and arranged to meet him to purchase another two ounces of cocaine (T. 285-286). When they met at Richards' house Quinones was accompanied by the appellant Cruz, whom Quinones introduced as his "compadre" (T. 287). Richards told Cruz that he was interested in purchasing four ounces of cocaine. At Cruz's direction Quinones produced four ounces of cocaine from his pocket and gave it to appellant, who in turn gave it to Richards. A price of $3,500 was agreed upon. At this point appellant suggested a possible trade of the cocaine for ten pounds of Richards' marijuana. This was discussed and agreed to and the exchange was effected (T. 287-291). Before appellant and Quinones left, Richards was given Cruz's telephone number (T. 291).

On February 7, 1974 Richards called appellant and arranged to meet him later that day in order to buy two

more ounces of cocaine (T. 296-297). When Cruz arrived with Quinones he supplied Richards with the two ounces on a consignment basis, Richards agreeing to give him $2,800 after the cocaine had been sold by him to his buyers (T. 298-299). Richards testified that he diluted this cocaine and sold four ounces of the resulting mixture to Detective McGroarty later that evening (T. 300).

On February 19, 1974, pursuant to a previously arranged plan, Cruz and Quinones came to Richards' house to supply him with the additional cocaine Richards had agreed to sell to McGroarty (T. 308-311). When they arrived at 999 Bushwick Avenue, McGroarty and Poster were already there, in the room upstairs. Richards met appellant and Quinones at the door and ushered them into the basement (T. 312-313). In a basement room Cruz produced a transparent bag of white powder and gave it to Richards (T. 314). Richards brought it to a room next to where McGroarty and Poster were waiting, mixed it with four ounces of a dilutant, and brought the eight ounce mixture in to the undercover police officers (T. 313-315). There, the cocaine was exchanged for $7,500 and the two police officers were led out. Richards then returned to where the appellant and Quinones were waiting and handed $3,500 to Cruz, who gave it to Quinones to hold (T. 317-319). Shortly thereafter they left.

Richards testified that he did not recall leaving 999 Bushwick Avenue that night between McGroarty's and Poster's visits (T. 323).

After lengthy cross-examination of Richards was completed by both defense attorneys, Judge Judd permitted Police Officer Luis Castro to testify that on three prior occasions he had purchased cocaine from appellant. These

purchases occurred on February 1, 1974 (T. 498-506), February 7, 1974 (T. 506-509) and February 18, 1974 (T. 517-527). Police Officer Castro also identified, and the Court heard, a series of recorded telephone and face-to-face conversations between Cruz and Castro in which they discussed these three transactions.

B. The Defense Case

Both defendants put in defenses during which the defendant Quinones admitted that he and Cruz had been to Richards' house, but denied that they had delivered cocaine. Instead, he stated that they were there to purchase marijuana (T. 563-571). Appellant did not take the witness stand.

At the end of the defense case both sides formally rested and the Court made the following findings:

> "I find beyond a reasonable doubt that Mr. Cruz came to 999 Bushwick Avenue on February 19, 1974, to sell cocaine; that he had a quantity in his possession and that he distributed it to Mr. Richards and therefore I find him guilty on both counts, and I deny the motions for acquittal.
>
> As to Quinones, I think it is more likely than not he was acting in concert with Mr. Cruz, came there to protect his interest and perhaps those of his in-laws in collecting his share or their share of the proceeds of the cocaine; however, the corroboration of Richard's testimony was less substantial on Cruz [sic]—on Quinones than in the people who had arrived just before he went out of the room.

I can imagine reasons why Mr. Richards might lie as to the source of his cocaine, but I think it's more likely that he was telling the truth with respect to this particular occasion and that is corroborated, I believe, by the evidence of Mr. Cruz had dealt in cocaine before, not only pursuant to Mr. Richards' testimony but also according to Officer Castro's testimony.

That indicates to me that his purpose in coming to 999 Bushwick Avenue was to deliver cocaine.

* * * * *

I don't think the business card can be given quite as much weight as [the Assistant United States Attorney] wanted to put on it.

And assuming that Mr. Quinones lied on the witness stand to protect himself and incidentally to protect Cruz, I don't think that's enough to show that he received the money that Richards said was given to him.

Subsequently, I find there is a reasonable doubt of Mr. Quinones' guilt. I find him not guilty on both counts, and I grant the motion for acquittal.

I'm uneasy about releasing somebody that's likely to be a drug dealer, but I think that's the consequence of the Government's burden of proof beyond a reasonable doubt, and I hope that Mr. Quinones will learn a lesson from his narrow escape and separate himself entirely from any dealings in cocaine or any other illicit drugs" (T. 672-673).

ARGUMENT

POINT I

Sufficient evidence was adduced to substantiate the District Court's conviction of the appellant.

Relying on no cited authority, appellant contends that his guilt was not proven beyond a reasonable doubt. He argues that apparent inconsistencies in the testimony of Ronald Richards made it impossible for Judge Judd to properly conclude that he was guilty as charged. In the Government's view this allegation is without merit and, further, not in keeping with the established reviewing standards of evidentiary sufficiency in this Circuit.

In *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974) this Court announced the standard by which non-jury judgments of conviction will be tested. In *Freeman*, it was held that a finding of guilt beyond a reasonable doubt, in a non-jury trial, will not be disturbed when:

> ". . . upon the evidence, giving full play to the right of the trial judge to determine credibility, weigh the evidence, and draw justifiable inferences of fact, 'a reasonable mind might fairly conclude guilt beyond a reasonable doubt'."

This standard, it was made clear, did not alter the principle that following such a finding, this Court would consider the evidence in a view most favorable to the Government. *Freeman, supra. See also, United States* v. *Brown*, 456 F.2d 293, 295 (2d Cir.), *cert. denied*, 407 U.S. 910 (1972); *United States* v. *Glasser*, 443 F.2d 994, 1006 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States* v. *Kahaner*, 317 F.2d 459, 467-468 (2d Cir.), *cert. denied*, *sub nom Corallo* v. *United States*, 375 U.S. 835 (1963).

Viewing the evidence in the instant case by this standard it is readily apparent that Judge Judd's specific findings were justified (T. 672-673).

On the evening of February 19, 1974 the appellant arrived at Ronald Richards' home. He was observed entering and leaving by surveillance agents. The observing agents made no mention of anyone else (with the exception of the undercover officers and appellant's co-defendant) entering or leaving during the time appellant was in the house. The testimony is uncontradicted that, once inside the house, appellant was shielded from the undercover officers' view. He delivered four ounces of cocaine to Richards, was paid and was observed leaving shortly after the officers left. Although Detective McGroarty could not testify that he saw the appellant actually hand the cocaine to Richards, the circumstantial evidence adduced is more than sufficient to convict. This is especially true in light of the testimony of Police Officer Castro that on three prior occasions he too had purchased cocaine from the appellant.

In *United States* v. *Beltram*, 388 F.2d 449, 451 (2d Cir. 1968), this Court was presented with the same question of sufficiency it is asked to determine here. In *Beltram* it was held, with equivalent factual circumstances, that the evidence was adequate to sustain the conviction.[3]

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[3] In *Beltram* the defendant was convicted after a non-jury trial, of violating Title 26, United States Code, Sections 4705(a) and 7237(b) (selling narcotics without a written order on a form issued for the purpose by the Secretary of the Treasury). Beltram had brought an undercover agent to his apartment, on two separate occasions, to await the arrival of the defendant with the cocaine to be sold to him. On each occasion the undercover agent was prevented from seeing who it was that delivered the narcotics, thereby foreclosing any direct testimony of delivery at the trial.

[Footnote continued on following page]

It would be difficult to perceive of a factual context providing a more justifiable basis for affirming the explicit findings of this trial Court than those presented here.

POINT II

The admission of evidence of prior similar criminal acts of appellant was proper.

While acknowledging that the inclusion of evidence of prior similar criminal acts is the rule, rather than the exception, appellant contends that such admission in the instant case was error. As appellant correctly notes (Appellant's Brief, at 6), Rule 404 of the newly adopted Federal Rules of Evidence, codifies what has long been well-established law in this Circuit. It provides, in pertinent part, that:

> "* * *—Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident".

Although, concededly, the new Rules were not in effect at this trial, their confirmation of the law of this Circuit on the point is noteworthy.

However, the defendant was observed, on both occasions, entering and leaving the apartment building, by surveillance agents. These agents testified that no one, other than the defendant, entered the building after Beltram and the undercover agent, and that no one left before he did. They further testified that the times of his visits were consistent with the times that the contraband was delivered. *See also, United States* v. *Fiore*, 443 F.2d 112, 116 (2d Cir. 1971).

Apparently relying on *Spencer* v. *Texas*, 385 U.S. 554 (1967), appellant avers that evidence of this type "must be offered to prove a fact that is substantially at issue" (Appellant's Brief, at 6). Inasmuch as "intent" is not in issue here, argues appellant, it was improper for Judge Judd (sitting without a jury) to allow himself to hear evidence of other narcotics transactions. Neither the record of this trial nor the decisions of this Court support appellant's position.

United States v. *Deaton*, 381 F.2d 114 (2d Cir. 1967), a seminal decision in this area, and the only authority upon which appellant relies, states this Circuit's rule. There it was held that ". . . evidence of other crimes is admissible except when offered solely to prove criminal character". *Supra*, at 117. Since *Deaton*, this "inclusory" form of the rule has been considered and approved in numerous decisions. *See, e.g., United States* v. *Papadakis*, 510 F.2d 287 (2d Cir. 1975); *United States* v. *Blasingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 401 U.S. 945 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970); *United States* v. *Super*, 492 F.2d 323 (2d Cir. 1974); *United States* v. *Gerry*, — F.2d — (2d Cir. Slip opinion, 2583, 2599, decided March 28, 1975).

Further, the defendant's recent prior criminal conduct negates the absence of intent and design, *Deaton*, *supra*, at 117-118, and was properly introduced during the Government's direct case as a matter either of anticipation, cf. *United States* v. *Puff*, 211 F.2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954); *Sherman* v. *United States*, 356 U.S. 369 (1968), or, more generally because of the Government's overall burden of proof, *United States* v. *Gardin*, 382 F.2d 601, 604 (2d Cir. 1971).

As evidenced by the District Court's finding that the prior narcotics transactions tended to corroborate Rich-

ards' testimony (T. 672-673), it is clear that Judge Judd utilized this evidence in exactly the manner foreseen and approved by this Court's decisions and the Government's offer of proof (T. 3-10). Clearly the element of intent is in issue in a prosecution under Title 21, U.S.C., § 841(a)(1). The statute specifically prohibits only that possession of a controlled substance which is accomplished "with intent to distribute". So long as the evidence of other crimes, in some probative way, tends to corroborate this element, among others, it is competent and admissible. Appellant's contention that the district court judge, sitting without a jury, was prejudiced by allowing himself to hear the evidence is anomalous. If such an irrevocable prejudice occurred, then certainly it occurred as soon as the Court was called upon for a preliminary ruling on the admissibility of the evidence. If appellant's syllogism is carried to its predictable conclusion, once a judge is asked to determine an issue of admissibility the defendant would be forever precluded from having the case tried before that judge without a jury. In all events, the district court judge in this case made it exceedingly clear that he considered this evidence solely for its corroborative value in proving that appellant was guilty of the crimes charged (T. 671-672).

POINT III

The verdicts of guilty and not guilty as to appellant and Quinones, respectively, are not inconsistent.

Appellant contends that inasmuch as Judge Judd found him guilty and his co-defendant innocent, that verdict constitutes an irreconcilable contradiction necessitating a reversal of his conviction. In furtherance of this position appellant cites this Court's decision in *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960). He argues

that if the District Court believed Ronald Richards sufficiently to find appellant guilty, it must follow that Richards was also truthful about Quinones' role, and an acquittal of Quinones is anomalous. Therefore, he appears to suggest, Cruz's conviction must be reversed. Appellant's contention is syllogistically incorrect; nor it is supported by the facts or the law.

Initially, it is clear that *Maybury, supra*, is distinguishable from the case at bar. In *Maybury*, appellant's conviction for uttering a forged instrument was reversed because there was no way to "rationally" reconcile it with Judge Abruzzo's acquittal of him on the charge of forging that same instrument. This Court is not faced with an equivalent situation at all. Here, one of two defendants was acquitted, a situation which occurs with some frequency. The trier of fact, in this case a judge, was not convinced beyond a reasonable doubt that both defendants were guilty.

Fortunately, in this respect, we are not compelled to speculate on what reasoning was utilized by the trier of fact in reaching this result in this case. The district court judge made a clear explanation of his decision on the record. *See remarks quoted at pages 6-7, supra.* It is respectfully urged that Judge Judd was doing exactly what it would have been proper for a jury to do. Based upon the totality of the case and in light of all the evidence he chose to believe part of Richards' testimony and to discern that part which was not corroborated by other sources.

Such a verdict is hardly inconsistent. If anything it exemplifies exactly the disciplined integrity that this Court insisted upon in non-jury cases such as *Maybury, supra.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: September 15 1975

DAVID G. TRAGER,
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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 12th day of September, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

George Sheinberg, Esq.
66 Court Street
Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
12th day of Sept., 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977